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Mohamad Asraf bin Marzuki v Public Prosecutor

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HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO KA-41S-25–12 OF 2018
CHAN JIT LI J
21 DECEMBER 2020

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether learned magistrate had misdirected himself — Whether learned magistrate had failed to consider appellant's defence — Whether learned magistrate was still duty bound consider evidence adduced at defence stage — Penal Code s 354

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This was an appeal against the conviction and sentence of the appellant under s 354 of the Penal Code ('the Code') where the appellant was sentenced to three years imprisonment and a fine of RM8,000, in default one year imprisonment. The appellant was initially acquitted at the end of the prosecution's case wherein the prosecution had appealed against the acquittal to which the High Court had allowed the appeal which then proceeded to direct the case to be remitted to the court of first instance to hear the defence. At the conclusion of the defence case the magistrate convicted and sentenced the appellant as he found that the facts raised by the defence were already raised during the prosecution's case and therefore there was no need for him to further evaluate the evidence as the High Court came to a finding that, despite the existence of such evidence, a prima facie case had been made out. The appellant submitted that the learned magistrate had committed an error when he failed to consider the appellant's defence. The deputy public prosecutor submitted that the learned magistrate had given due consideration to the defence.

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Held, allowing the appeal and setting aside the conviction and sentence.

(1) The learned magistrate misdirected himself when he declared that the testimony of the defence did not merit any consideration on the basis that the same facts had previously been raised by way of cross-examination during the prosecution's case and therefore there was no necessity for him to make a further evaluation of the evidence (see para 10).

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(2) When the High Court considered the set of statements in the appeal against the order of acquittal, it was merely a suggestion by the defence to the prosecution witnesses and did not constitute evidence. At best they served as an indication of the defence the appellant proposed to set up if indeed defence was called. However, when the appellant made those statements under oath, those statements became sworn evidence and it

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was incumbent on the learned magistrate to consider those same statements before coming to a conclusion whether or not the prosecution had established a case beyond reasonable doubt (see paras 12–13).

(3) The learned magistrate made a fundamental error when he opined that since the defence evidence were 'facts' which the High Court had relied on in determining as to whether or not a prima facie had been established, therefore, the defence evidence adduced at the defence stage did not merit any consideration by him. It was a serious misdirection. It was elementary that although the High Court had ruled that there was a prima facie case made out by the prosecution against the appellant, the learned magistrate was still duty bound to give consideration to the evidence of the accused adduced at the defence stage and to make an evaluation as to whether a reasonable doubt had been raised against the prosecution (see para 14).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap sabitan dan hukuman perayu di bawah s 354 Kanun Keseksaan ('Kanun tersebut') di mana perayu telah disabitkan dengan tiga tahun pemenjaraan dan denda RM8,000 dan sekiranya gagal bayar, satu tahun pemenjaraan. Perayu pada mulanya dilepaskan dan dibebaskan di akhir kes pendakwaan yang mana pihak pendakwaan telah merayu terhadap pelepasan dan pembebasan tersebut dan Mahkamah Tinggi telah membenarkan rayuan dan mengarahkan untuk kes tersebut diremitkan ke mahkamah yang mendengarnya untuk kali pertama untuk mendengar pembelaan. Di akhir kes pembelaan, majistret mensabitkan dan menjatuhkan hukuman kepada perayu kerana mendapati bahawa fakta-fakta yang dibangkitkan oleh pihak pembelaan telahpun dibangkitkan semasa kes pendakwaan dan oleh itu, tiada keperluan untuk majistret membuat penilaian lanjut terhadap keterangan memandangkan Mahkamah Tinggi telah membuat dapatan bahawa, walaupun dengan kewujudan keterangan sedemikian, suatu kes prima facie telah dibuktikan. Perayu telah berhujah bahawa majistret telah membuat satu kekhilafan apabila gagal untuk mempertimbangkan pembelaan perayu. Timbalan pendakwa raya telah berhujah bahawa majistret telah memberikan pertimbangan yang wajar kepada pembelaan.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman.

(1) Majistret telah salah arah apabila mengisytiharkan bahawa keterangan pembelaan tidak perlu dipertimbangkan atas dasar bahawa fakta-fakta yang sama telahpun sebelum ini dibangkitkan melalui pemeriksaan balas semasa kes pendakwaan dan oleh yang demikian tiada keperluan untuk membuat penilaian lanjut terhadap keterangan tersebut (lihat perenggan 10).

(2) Semasa Mahkamah Tinggi mempertimbangkan set pernyataan dalam

rayuan terhadap perintah pembebasan, ianya hanya satu cadangan daripada pembelaan kepada saksi-saksi pendakwaan dan tidak berbentuk keterangan. Paling baik pun ianya merupakan suatu indikasi pembelaan yang dicadangkan oleh perayu sekiranya pembelaan sememangnya dipanggil. Namun, apabila perayu membuat pengataan tersebut atas sumpah, pengataan tersebut telah menjadi keterangan bersumpah dan ianya adalah kewajipan majistret yang untuk mempertimbangkan pengataan yang sama tersebut sebelum membuat kesimpulan sama ada pendakwaan telah berjaya membuktikan suatu kes melampaui keraguan yang munasabah (lihat perenggan 12–13).

(3) Majistret membuat satu kesilapan asas apabila berpendapat bahawa memandangkan keterangan pembelaan merupakan 'fakta-fakta' yang Mahkamah Tinggi telah bergantung kepada dalam membuat keputusan sama ada satu kes prima facie telah dibuktikan, maka, keterangan pembelaan yang dikemukakan tidak perlu dipertimbangkan olehnya. Ini merupakan satu salah arah yang serius. Ianya adalah asas bahawa walaupun Mahkamah Tinggi telah memutuskan bahawa kes prima facie telah dibuktikan oleh pendakwaan terhadap perayu, majistret tetap bertanggungjawab untuk memberikan pertimbangan terhadap keterangan orang yang dituduh yang dikemukakan pada peringkat pembelaan dan untuk membuat penilaian sama ada satu keraguan yang munasabah telah dibangkitkan terhadap pendakwaan (lihat perenggan 14).]

Cases referred to

Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577; [1998] 2 CLJ 1, FC (refd)
Noor Azman bin Abidin v PP [2013] MLJU 703; [2014] 1 CLJ 58, CA (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
Shah Rehan bin Abdul Rahman v PP [2015] 3 MLJ 337; [2015] 4 CLJ 71, CA (refd)

Legislation referred to

Criminal Procedure Code s 173(m)(i)
Penal Code s 354

M Chandran (Thiru Chandran & Partners) for the appellant.
Arif Hakimi bin Abdul Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Chan Jit Li J:

[1] This appeal emanates from the magistrate court at Sungai Petani, Kedah.

[2] At the lower court the appellant was convicted of a charge under s 354 of the Penal Code. The charge reads as follows:

> Bahawa kamu pada 24hb Mei 2015, antara jam 1.00 tengahari hingga jam 5.00 petang bertempat di dalam rumah No 268, Taman Sri Impian, Jalan Kual Ketil, 08000 Sungai Petani, di dalam daerah Kuala Muda, di dalam negeri Kedah Darul Aman, telah melakukan kekerasan jenayah terhadap Nur Izzaty bt Mohd Redza No Mykid 100201–02–0584 dengan niat mencabul mangsa dengan memasukkan jari ke dalam kemaluan mangsa.
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> Oleh yang demikian, kamu melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 354 Kanun Keseksaan.

On conviction he was sentenced to three years imprisonment and a fine of RM8,000, in default one year imprisonment.

[3] It will be necessary to set out the background of the appellant's trial at the magistrate's court. The trial had proceeded before the learned magistrate sometime in 2016. At the close end of the prosecution's case the learned magistrate made a finding that the prosecution had failed to establish a prima facie case. Accordingly, on 15 December 2016 the learned magistrate acquitted the appellant without calling for defence.

[4] Dissatisfied with this order of acquittal, the respondent-prosecution appealed against the said order of acquittal at the High Court at Alor Setar. The said appeal was heard and allowed by the Alor Setar High Court on 14 November 2018. Apart from setting aside the order of acquittal, the Alor Setar High Court directed that the case do be remitted to the court of first instance for the same magistrate to hear the defence.

[5] The learned magistrate complied with the High Court order of 14 November 2018 and at the conclusion of the defence's case, convicted and sentenced the appellant. The appellant instituted the instant appeal against both the order of conviction and the sentence imposed.

[6] En M Chandran, the learned counsel for the appellant, submits that the appellant's appeal stands on only one issue. It is his submission that the learned magistrate had committed an error which warrants appellate interference as the learned magistrate had failed to consider the appellant's defence. En Chandran relies on paras 8 and 9 of the grounds of judgment in support of his submissions. I shall revert to the said paragraphs in greater detail later.

[7] En Ariff Hakimi, the learned deputy public prosecutor appearing from the respondent, in reply submits that the learned magistrate had given due consideration to the defence as the following assessment had been made by the learned magistrate:

> (11) Apa yang jelas ialah keterangan mangsa bahawa kemaluan beliau dikorek oleh OKT sememangnya benar dan disokong oleh laporan perubatan mengesahkan terdapat kesan kemerahan. Meskipun seorang kanak-kanak disifatkan sebagai suka berfantasi, namun mustahil juga bagi seorang kanak-kanak untuk menipu.
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> (12) Maka, mahkamah dengan ini memutuskan bahawa pembelaan OKT adalah suatu rekaan dan sama sekali telah gagal menimbulkan sebarang keraguan yang munasabah pada kes pendakwaan.
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> (13) Mahkamah dengan ini mendapati pihak pendakwaan telah berjaya membuktikan pertuduhan ke atas OKT pada tahap melampaui keraguan yang munasabah. OKT dengan ini didapati bersalah dan disabitkan dengan kesalahan sepertimana pertuduhan.

[8] With respect, I am of the view that para 11 of the grounds of judgment referred to by the learned DPP is more an evaluation by the learned magistrate of the prosecution's evidence. Although, the learned magistrate did conclude that the defence was a 'rekaan', he did not give any reason to support this finding.

[9] In this judgment, I think it is pertinent that I should focus only on two paragraphs of the learned magistrate's grounds of judgment, namely, paras 8 and 9 which appears as follows:

> (8) Melihat kepada pembelaan yang dibangkitkan oleh OKT, semua fakta ini telah pun dibangkitkan ketika kes pendakwaan lagi.
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> (9) Seperti yang diputuskan oleh Mahkamah Tinggi pada 18.11.18, jelas pihak pendakwaan telah berjaya membuktikan kes *prima facie*. Maka sudah tentulah fakta-fakta pembelaan ini adalah fakta-fakta yang tidak bermerit lagi untuk dipertimbangkan.

[10] The learned magistrate had declared in the above paras 8 and 9 that the defence's testimony did not merit any consideration. The learned magistrate had opined that since the evidence put forth in the defence were the same 'facts' which had been raised by the defence by way of cross-examination at the stage of the prosecution's case there was no necessity for him to make a further evaluation of the evidence adduced by the accused at the defence stage. In this, with respect, the learned magistrate had misdirected himself.

[11] The approach adopted by the learned magistrate runs contrary to a trite principle of law which had been succinctly stated in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 by Augustine Paul J (as he then

was) as follows (at p 121):

> A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence if it is clearly repudiated by the witness to whom it is made. In this regard, it was observed in *Emperor v Karimuddi Sheikh* 1932 AIR Cal 375:
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> > Mere suggestions by a pleader or advocate for the accused do not amount to evidence by the fact suggested, unless they are either partly or wholly accepted of the witness for the prosecution.

[12] In other words, at the time when the Alor Setar High Court considered the said set of statements in the appeal against the order of acquittal those statements (unless admitted) were merely suggestions by the defence to the prosecution's witnesses and did not constitute evidence. At best, they served as an indication of the defence the appellant proposed to set up if indeed defence was called (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705).

[13] However, when the appellant made those statements under oath before the learned magistrate after defence was called, those statements metamorphose into sworn evidence. Section 173(m)(i) of the Criminal Procedure Code (Revised 1999) made it incumbent on the learned magistrate to consider those same statements (together with the testimony of the second defence witness) before coming to a conclusion whether or not the prosecution had established a case beyond reasonable doubt. The issue now is did the learned magistrate discharge this duty?

[14] As to para 9 of the grounds of judgment, the learned magistrate yet again made a fundamental error when he opined that since the defence evidence were 'facts' which the Alor Setar High Court had relied on in determining as to whether or not a prima facie had been established, therefore, the defence evidence adduced at the defence stage did not merit any consideration by him. This, I regret to say, is serious a misdirection on his part. It is elementary that although the High Court had ruled that there was a prima facie case made out by the prosecution against the appellant, nonetheless, the learned magistrate was still duty bound to give due consideration to the evidence of the accused adduced at the defence stage, and to make an evaluation as to whether or not a reasonable doubt had been raised by the defence against the prosecution. The learned magistrate should not have allowed himself to prejudge the defence by the mere finding of the Alor Setar High Court that there was a prima facie case against the appellant.

[15] Viewed in totality, I find that there was a total failure on the part of the learned magistrate to consider the defence. There is an omission which

warrants appellate interference (*Shah Rehan bin Abdul Rahman v Public Prosecutor* [2015] 3 MLJ 337; [2015] 4 CLJ 71; *Noor Azman bin Abidin v Public Prosecutor* [2013] MLJU 703; [2014] 1 CLJ 58; *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577; [1998] 2 CLJ 1)

[16] Accordingly, this appeal is allowed. The order of conviction and sentence is set aside and the case is to be remitted to the lower court for the same magistrate to give a considered decision by evaluating the evidence before him.

Appeal allowed, conviction and sentence set aside.

Reported by Izzat Fauzan